104 FERC ¶ 61,131
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Pacer Power LLC | Docket No. EL03-23-000

ORDER ADDRESSING PETITION FOR DECLARATORY ORDER

(Issued July 25, 2003)

1. On October 31, 2002, Pacer Power LLC (Pacer) filed a petition for declaratory order (Petition) concerning its proposed operation of a membership-based electronic trading platform that is designed to provide its members, who will buy and sell "capacity reservations," with non-power services. Pacer requests that the Commission grant its Petition and issue a declaratory order determining that Pacer will not be deemed a "public utility" under the Federal Power Act (FPA) and thus will not be subject to this Commission's jurisdiction as a result of operating its electronic information exchange and providing certain non-power services to its members.

2. In this order, we find that, at this time, Pacer will not be deemed a "public utility" under the FPA for the reasons discussed below. However, the Commission has been undertaking enhancements to its regulatory and informational requirements in light of our Staff's Final Report on Price Manipulation in Western Markets (*Western Markets Report).* As a result, we may find in the future that it may be appropriate to take further action with regard to Pacer and other power trading platforms. Further, as discussed below, the Commission will also re-examine this determination if there is a change in the facts presented by Pacer, such as if Pacer operates in a manner different from its representations, or if in the future, Pacer operates its system in a manner which exerts a material influence over the price, terms or conditions of, or participants, in jurisdictional services. Finally, in light of recent problems in wholesale power markets and heightened concerns about potential market manipulation, our order is premised on Pacer providing to the Commission, information pertaining to its operations and transactions conducted on its platform as discussed herein.

3. In the *Western Markets Report*, Staff identified certain proposed refinements to our regulatory processes designed to improve our ability to address the types of market

abuses identified in the report. These proposals include: revisions to existing blanket certificates for the sale of natural gas and market-based rate tariffs for the sale of power; greater data access for the Commission and required data retention by jurisdictional entities; and proposals related to the interaction of jurisdictional entities with electronic trading platforms and the monitoring and oversight of such platforms.

4. In light of Staff's recommendations, we are reviewing ways to enhance our ability to assure that competitive gas and electric markets provide consumers with just and reasonable rates. Effective market oversight and appropriate conduct requirements for jurisdictional entities are necessary elements of effective regulation. As can be seen from the *Western Markets Report*, electronic trading platforms such as Enron Online can be operated in a manner that can lead to concerns of market manipulation. The Commission recognizes that Pacer and other currently operating electronic trading platforms: use a different business model than Enron Online; provide a valuable service to competitive markets by offering a mechanism to efficiently effectuate jurisdictional transactions; and provide liquidity and transparency to the market. However, as such entities become more integral to price discovery and transaction execution for jurisdictional transactions, the Commission will consider whether revisions to its existing regulatory approach should be made to reflect market evolution.

5. Our determination benefits customers by ensuring that, although we are not exerting jurisdiction over Pacer at this time, the Commission will have sufficient information to monitor Pacer's activities and resulting jurisdictional transactions to monitor markets to assure just and reasonable rates and to re-assess jurisdictional status, as necessary.

I. Background

6. As a result of *the Western Markets Report* and other developments in electric power and natural gas markets, we have generally reviewed the range of existing transaction facilitators in today's electric energy markets, the facilities they control, and the role they play in those markets, to evaluate whether the Commission should exercise jurisdiction over any or all of them as public utilities under the FPA.

7. **The Transaction Facilitators:** Power and gas markets are facilitated by certain third party entities. The principal entities are: voice brokers; electronic trading platforms; RTO/ISO spot markets and trading hubs; and, futures markets.

8. **Voice Brokers:** Voice brokers use telephone and fax/email to help buyers and sellers of energy consummate transactions. They create a telephone-based market

wherein they elicit offers to buy and sell energy until “a bid is hit.” While they send “broker confirms,” their actions do not cause a binding arrangement until buyer and seller bilaterally sign off. On occasion, a voice broker will act as agent for a client conducting a request for proposals. Voice brokers do not take title or dictate or control price, terms or conditions. Voice brokers receive a fee for each transaction.

9. **Electronic Trading Platforms:** In the recent past the dominant electronic platforms were Enron Online and Dynegy Direct. These, now defunct platforms, were of the same nature of a “one to many” system where Enron or Dynegy was always on one side of a transaction taking title to power or gas. Today, the most widely used electronic trading platform is the Intercontinental Exchange (ICE). ICE is a “many to many” exchange where buyers and sellers use the platform to enter into bilateral contracts based upon bilaterally agreed umbrella contracts and credit. ICE provides a structured internet-based vehicle to consummate these trades. ICE allows buyers and sellers to transact certain predetermined standard products which it states are preferred by it clients. Transactions on ICE are binding. ICE does not take title or dictate bilateral terms or conditions but it does establish the products traded on its platform. ICE’s service is fee-based. ICE also runs an electronic confirmation business for non-platform transactions. Through affiliations with others, transactions executed on ICE can be cleared.

10. Besides ICE other trading platforms are: APX, Bloomberg, and Tradespark. The New York Mercantile Exchange (NYMEX) also offers certain over the counter (OTC) products though an electronic exchange. None of these trading platforms take title to the power but some have features that involve them it in transactions.

11. **Futures Exchanges:** Futures contracts representing a very limited set of delivery locations are traded on Commodity Futures Trading Commission (CFTC) regulated exchanges. For example, the only gas location is Henry Hub and the only currently trading electric locations is PJM's western hub.

12. **RTO/ISO Physical and Virtual Spot Markets:** Regional Transmission Organizations/Independent System Operators (RTOs/ISOs) operate physical and virtual next day and real-time markets. They also publish prices for and specify trading hubs for the purpose of facilitating bilateral trades in forward markets and index-based derivatives. They are regulated by the Commission.

13. Over time the Commission has evaluated whether transaction facilitators should be jurisdictional. The Commission has found that due to the pervasive regulation of futures markets by the CFTC and the fact that futures rarely, if ever, go to physical delivery,

unless and until an electricity future contract goes to physical delivery (in a sale for resale in interstate commerce), it is not jurisdictional. *New York Mercantile Exchange,* 74 FERC ¶ 61,311 (1996). In *Continental Power Exchange, Inc.*, 68 FERC ¶ 61,235 (1994), the Commission found that an electronic exchange operating much like an electronic voice broker, not controlling any aspect of a transaction or taking title was not jurisdictional.

14. However, in *Southern California Edison Co.*, 80 FERC ¶ 61,262 (1997), the Commission found the California Power Exchange (CalPX) to be a public utility because, while it did not take title, it had material involvement in the transaction as it: determined which power was bought and sold; which power went to which buyer; and what price the power was ultimately sold for. In *APX, Inc.*, 82 FERC ¶ 61,287 (1998); *order denying rehearing* 84 FERC ¶ 61,020 (1998), the Commission found the APX electronic platform was jurisdictional because its process allowed it to ultimately set the price of transactions, although it did not take title. The principle underlying the determination was that APX "exerted effective control over facilities" used for the sale of electric energy in interstate commerce and its platform was an "integral part of the transaction chain."[1] Thus, under Commission precedent, if a facilitator can exercise effective control over electricity sales for resale in interstate commerce, such facilitator is jurisdictional.

A. Other Relevant Events

15. **The Credit/Clearing Conference:** On February 5, 2003, the Commission, jointly with the CFTC, held a joint conference on credit and clearing in energy markets. The conference raised several issues relevant to the Pacer application. In addition, it became apparent that there are several entities similar to Pacer currently operating (for example, ICE). Further, aspects of such operations and "clearing," in general, raised regulatory and jurisdictional questions. Unlike Pacer, these other entities engage in business activities involving natural gas and other commodities as well as power.

16. **The Natural Gas Price Spike:** In late February through early March 2003, natural gas markets, particularly in the Northeast, experienced a significant price spike. The Commission's Office of Market Oversight and Investigations (OMOI) has undertaken a comprehensive review of the matter. In addition to supply levels and deliverability issues, OMOI has included consideration of significant volumes of transactional information (physically and financially settling) in its review. Since such

[1]The *APX* orders were upheld by the DC Circuit. *APX v. FERC*, 204 F.3d 1144 (2000).

information is not currently supplied to the Commission or otherwise readily available, subpoenas were sent to electronic trading platform operators, voice brokers and others to obtain it. The OMOI review of the natural gas price spike is illustrative of the scope of transactional data required for analysis and the role of electronic trading platforms and voice brokers in the market.

17. **The Western Market Investigation:** On March 26, 2003, the Commission released the results of its Staff's Western Market Investigation. In its report, Staff identified, *inter alia*, concerns related to the operation of the Enron Online trading platform; wash trading; and false reporting of transactions to index publishers. The report recommended that the Commission condition market-based rates and gas blanket certificates upon jurisdictional entities only using trading platforms that agree to provide the Commission with full access to trade reporting and order book information for trading systems and agree to appropriate monitoring requirements. The report addressed several issues with the Enron Online "one to many" platform. As we understand it, all currently operating platforms are of the "many to many" electronic bulletin board variety. Nevertheless, the report's proposed data access and monitoring proposals apply to all platforms.

18. **The Index Conferences:** On April 24, 2003, Commission Staff, together with representatives of the CFTC Staff held a technical conference where issues related to the formation of price indices for natural gas commodity sales were discussed in light of the recently reported problems in index credibility and apparent illiquidity at many delivery points. Various proposals for improving the current price reporting system were offered together with suggestions for the establishment of a Commission endorsed or supervised single reporting vehicle established along the lines of Self Regulatory Organizations (SROs) established in other industries. There was broad support for the use of comprehensive reliable information including price, delivery point, counterparty, volume and other relevant information in the establishment of such indices which not only report prices but also trading volumes to indicated liquidity.

19. A further conference was held on June 24, 2003. Prior to the conference, Staff issued an associated paper framing issues related to index formation and reliability. At the conference, representatives of a significant portion of the natural gas industry reported on the outcome of a process through which they are attempting to create standards for reporting. This process included a "consensus" which placed certain minimums on both index providers and compilers. While there were many aspects of disagreement, the consensus represented a material step forward. Other speakers further advanced "data hub" proposals. In addition, industry representatives indicated that, if the Commission could establish some sort of "Safe Harbor" insulating regulated entities from regulatory

exposure for data submission errors, it would remove a meaningful barrier to reporting currently in place.

20. On July 2, 2003, an open workshop was held to develop the "Safe Harbor" concept. It was clear from the discussion that many parties were concerned that if the "best practices" needed to create the most accurate and robust were adopted by the Commission as a prerequisite for obtaining the safe harbor (i.e. counterparty data), many entities many not report in today's voluntary environment. The Staff was urged to try a set of lesser standards on the hope that there would be a material improvement in reporting participation as a result. Trade association representatives contended that their members would increase reporting based upon this lesser standard. If reporting did not pick up the Commission could revisit the issue.

21. On July 24, 2003, the Commission issued a policy statement addressing index reporting and formation, including a safe harbor provision with the hope of encouraging further voluntary price reporting.

22. **The "Behavioral Rules" Proposal:** On June 25, 2003, the Commission proposed "behavioral rules" for jurisdictional gas and electric market-based rate sellers. These proposed rules included accuracy requirements for information flows to index compilers, ISOs and the Commission and a data retention requirement associated with data underlying jurisdictional transactions. The proposal also noted that, while the *Western Markets Report* had recommended that a condition limiting electronic platform usage for jurisdictional sellers to those approved by the Commission, the proposal did not include that component at this time.

B. What is the Commission's interest with respect to transaction facilitators?

23. Over time, the Commission's regulatory efforts with respect to electricity and natural gas commodities have evolved from a cost of service focused regime to one much more oriented to markets. In natural gas, there has been statutory change affecting the Commission's regulatory authority over the commodity. In electricity, there has not. However, with the institution of market-based rates by regulation, electricity regulation has become market focused.

24. Electricity and natural gas markets have evolved in tandem with regulatory change. Energy marketing and trading companies have come into existence. Market participants have come to understand the value of risk management tools and products. Traders need to take and hedge positions. Utilities require risk management tools since they may no longer have fuel adjustment clauses and purchased gas adjustment clauses to shield them

from market risks. Generators and producers need longer-term markets with liquidity to sell forward into and create a stable cash flow.

25. In recognition of these needs, various market facilitators have emerged. Initially, a bilateral non-standardized market among participants came into being. That market was supported by voice brokers who created a “marketplace” for buyers and sellers to meet. The voice broker sector was successful and enabled many natural gas and electricity transactions. Traditional futures products sold on regulated exchanges also were introduced for energy. NYMEX futures contracts for a liquid gas hub were successful (Henry Hub). Similar futures contracts for liquid electricity hub were much less successful (Palo Verde & California-Oregon Border).

26. One reason electricity futures were less successful was the introduction of electronic trading platforms. These platforms permitted market participants that had already established trading relationships to efficiently enter into transactions at various trading locations without the expense of futures trading. The introduction and success of Enron On-line further established electronic trading. While they operate differently, ICE has now replaced the now defunct Enron Online as the trading platform with the highest volume of physical transactions. Of course, there are other potential competitors such as Pacer.

27. Voice brokers, regulated futures and electronic trading platforms all facilitate transactions in forward electricity and natural gas physical and derivatives markets (beyond next day or next hour physically settled transactions). These transactions and the markets they relate to are regulated to varying degrees by the Commission.

28. In the case of electricity, the Commission has instituted a market-based rates regime which relies upon a robust, fair and open competitive market to assure that rates charged to wholesale customers are “just and reasonable.” As a material amount of electricity transactions are facilitated (and confirmed) through such market facilitators, the Commission has a significant interest in assuring the “market” they represent is fair and competitive. Together with ISO-enabled spot markets, this represents the bulk of the marketplace in which jurisdictional electricity transactions (and transactions “relating to” or “affecting” jurisdictional transactions) take place. As such, it is important that the Commission undertake some sort of regulatory oversight/data collection over markets which are not already pervasively regulated (exchange traded futures). Such oversight is materially related to the viability of market-based rates and assuring that the Commission has a complete view all relevant aspects of the electricity market.

29. Further, as determined by the Commission with respect to APX, the amount of

involvement in the formation and implementation of transactions by market facilitators is an important element in determining whether the facilitator is jurisdictional. If the facilitator is materially involved in the transaction itself ("exerting effective control") through means such as the setting price or material terms jurisdictional transactions or implementing/administering such transactions, Commission jurisdiction over the facilitator may be appropriate.

30. In the case of natural gas, the Commission's regulatory scope over the commodity is more limited than electricity. However, the Commission does have authority at least over wholesale commodity sales other than "first sales" (e.g., those made by pipelines, pipeline affiliates and LDCs and their affiliates). Like its regulation of electricity, the Commission has determined that "just and reasonable" prices for jurisdictional gas commodity sales are created by those sales being made in a robust, fair and open competitive market. In addition, the Commission has authority to collect information associated with natural gas sales. In addition to its Natural Gas Act authority over jurisdictional sales, Section 315 of the Natural Gas Policy Act gives the Commission the authority to require the filing of all contracts for gas by "first sale purchasers."[2]

31. Much of the natural gas market is facilitated by the same entities that facilitate the electricity market. One significant difference is that, unlike the electricity market, there is no organized ISO market present. As such, together with the futures market, these OTC "markets" represent the short and long-term markets in which transactions occur. Regulatory oversight/data collection from these facilitators is an important element of a process in which the Commission can undertake its specific jurisdictional as well as its general responsibilities concerning the integrity of natural gas markets. Moreover, the standard of "effective control" over jurisdictional transactions is not static and may evolve with the market and the Commission's regulatory needs.

II. Pacer's Petition

32. Pacer anticipates establishing a new membership-based electronic trading platform that will provide parties which buy and sell Capacity Reservations[3] with certain non-power services, including credit analysis, counter-party risk protection, and depository banking services.

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[2]15 U.S.C. § 3375 (2000).

[3]Capacity Reservations are defined as a monthly contract for call on next-day power. Petition at 1.

33. Pacer states that it has been established for the sole purpose of carrying out the activities described in the Petition. In addition to equity contributions from its founders, Pacer states that it has also been substantially capitalized by Liberty Partners, a private equity fund. According to Pacer, Liberty Partners considers Pacer a portfolio investment.

34. Pacer states that it will not be owned by or affiliated with any "public utility" subject to the Commission's jurisdiction. Pacer also states that it is not, and does not seek to become, either a "public-utility company" or a "holding company," or an "affiliate" or "associate company" of either under the Public Utility Holding Company Act of 1935.[4]

35. Pacer states that its sole function would be to provide an environment to offer supplemental power in the form of Capacity Reservations in a membership exchange. Additionally, Pacer states that its system will be subject to rules, such as the requirement that buyers and sellers must have obtained required regulatory authorizations to engage in power transactions. Pacer indicates that it will neither establish nor modify the price for power between purchasing and selling members and will set no market reference price, nor affect any sale of power at wholesale. Further, Pacer states that at no time will it have even nominal title or possession of any power, nor will it have the ability to direct, dispatch, or withhold power that is posted for sale on its system. As explained by Pacer, it "neither fixes any price or term for power sales, or takes title to power; in fact, every sale of power through Pacer's electronic bulletin board can take place entirely without Pacer's involvement." *Petition at 20.*

36. Pacer states that its system will provide regulated market participants with another alternative to reduce the risks of relying on spot markets. It believes that by providing buyers and sellers with a transparent, risk-adverse Capacity Reservation, its members can function as bilateral suppliers. Further, Pacer states that it is not a power marketer, and any energy deliveries resulting from transactions made between its buying and selling members will be deliverable on the same terms as any other bilateral power sales, and subject to delivery under the tariff and rules of the applicable Regional Transmission Organization (RTO), Independent System Operator (ISO), or Independent Transmission Provider (ITP), and to regulation by this Commission.

III. How Pacer's System Would Operate

37. According to its Petition, Pacer states that only an eligible entity which is legally authorized to make purchases and/or sales of electric capacity and energy at wholesale,

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[4] See 15 U.S.C. § 79b(a).

complies with initial and ongoing credit requirements established by Pacer, makes technical disclosures, and agrees to comply with Pacer's rules and the Commission's jurisdiction may become a member of its system.[5] Under Pacer's rules, a prospective selling Member must establish that it, directly or indirectly, owns, operates or has under contract uncommitted capacity for which it is authorized as a member or participant in a particular ISO's or RTO's region to have power dispatched within that region and must also demonstrate that its generation which will be offered through Pacer is interconnected to, and is eligible to be delivered into, the RTO, ISO, or ITP in which the prospective selling Member wishes to make sales. Further, in order to purchase power, a prospective member must establish that it serves load within the particular RTO, ISO, or ITP region in which it is located and represent that it is legally and commercially capable of fulfilling its obligations to its counter-party.

38. Pacer states that all offers by its members to buy capacity are electronically posted, without modification by Pacer, onto the bulletin board.[6] Members wishing to buy or sell capacity would log onto the system and view other member's anonymous offers to purchase, and bids to sell, Capacity Reservations, along with their prices and quantity. Pacer states that bids or offers are matched either in whole or in part only by the voluntary action of its buying and selling members and reiterates that Pacer cannot effectuate a transaction between its members.[7]

39. Pacer states that a member's posting will only result in an executed trade when: (1) a selling member and a purchasing member exhibit posted prices which match

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[5]The Commission notes that an entity that is not subject to regulation as a public utility under Part II of the FPA cannot voluntarily submit to regulation as a public utility under the Commission's jurisdiction. (See New West Energy Corp., 81 FERC ¶ 61,416 (1997); order on reh'g, 83 FERC ¶ 61,004 (1998)). However, as we understand Pacer's proposal, to become a member of Pacer's system, an entity must agree to be subject to the Commission's jurisdiction for all Pacer-related purposes so that all of Pacer's members are on the same regulatory footing.

[6]The capacity will be traded as forward contracts for call on next-day power in units of either an entire future month (up to twelve months forward) or for the remainder of the current month in which the trade takes place.

[7]Pacer declares that it "is not in the energy delivery business, and as such, it does not schedule, arrange or direct transmission." Moreover, "Pacer does not act as an ISO, RTO or other transmission provider, transmission capacity scheduler, transmission marketer, transmission broker, or transmission administrator." *Petition at 12*.

exactly; (2) both members have selected the same period for the Capacity Reservation; (3) both members are located within the same RTO, ISO, or ITP region; and (4) both members execute the necessary functions on Pacer's system. Upon the successful execution of a trade, the purchasing member is required to make a partial payment within three days of the execution to Pacer's depository institution. Upon receipt of the funds, Pacer will deduct any transaction charges and remit the remaining amount to the selling member.

40. In the event of breach, default, or insolvency, Pacer states that its members, as well as its guarantors, possess substantial and effective remedies if such a situation should arise. Pacer states that matched offers to sell and bids to purchase power are enforceable legal contracts, and the defaulting party may be sued by its counter-party and by Pacer's counter-party protection provider. Further, Pacer states that its rules will require that a defaulting party accept, without contest, all liability for pricing and supply damage resulting from its default.

IV. Non-Power Features

41. Pacer states that its "value-added" component is its non-power features, which are designed to promote transparency, risk-prevention, and mitigation. The features include credit analysis, counter-party risk protection, and depository banking services. In terms of credit analysis, Pacer states that its members will have to disclose financial and corporate information, including three years of audited financial statements. In turn, Pacer will use such information, along with information from credit rating agencies, to calculate the amount of credit that will be afforded to a potential member. After the initial credit screen, Pacer intends to continually monitor its members' credit limits and financial conditions.

42. Pacer also intends to offer counter-party risk protection as a service to its members in an effort to minimize and mitigate the potential risks that may arise if a counter-party to a transaction defaults. Pacer states that the fee for this protection will be based according to the amount of coverage provided, market risks and underwriting criteria. Finally, Pacer will offer depository banking services to its members. According to Pacer, it will select an independent bank to handle the transfer of funds associated with transactions made by its members on its system. Pacer explains that it will not have access to any of its members' funds being held by the bank, as the bank will be provided with instructions as to the payout terms for each transaction on its system.

V. Request for Disclaimer of Jurisdiction

43. Pacer states that it cannot properly be regulated as a "public utility" under Section 201(e) of the FPA[8] since it will neither make nor modify any power sales, nor engage in any aspect related to the transmission of power. Further, Pacer states that it will not exert any control over facilities used for the resale of electric energy in interstate commerce, and will not take title to power. To this end, Pacer requests a declaratory order be issued that exempts its operations and activities from the Commission's jurisdiction.

44. Citing precedent, Pacer states that a power broker which does not take title to power is not a public utility by virtue of its brokering, and further, the Commission will confirm such a non-jurisdictional status in response to the appropriate petition for declaratory order.[9] Pacer also recognizes that the Commission has ruled on several other petitions from power brokers that attempted and failed to receive non-jurisdictional status from the Commission. Pacer distinguishes itself from these power brokers, stating that these brokers engaged in activities such as: (1) exclusively matching bids and offers; (2) determining a market price for wholesale power; (3) exercising direct control over transactions; (4) determining whose power is to be bought and sold; and (5) acting as a transmission and delivery scheduler. Pacer states that none of these factors are present with respect to its system.

45. Pacer states that by granting this Petition, the Commission will promote competition in power markets by encouraging bilateral sales. Further, Pacer states that the Commission will not lose any jurisdiction over Pacer's members, since their activities will continue to be subject to the FPA. Finally, if the Commission grants the Petition, Pacer commits that "it will cooperate with inquiries from the Commission's staff and from Commission-authorized market monitoring entities, and that it will require its Members, by the terms of their agreements with Pacer, to likewise cooperate."[10] Pacer asserts that the Commission will be given access to the same quality of information as if Pacer were jurisdictional, and as such, the Commission will be doing no damage to markets or its own enforcement of the FPA by granting this Petition.

VI. Notice of Filing and Responsive Pleadings

46. Notice of the Petition was published in the Federal Register, 67 Fed. Reg. 68,856 (2002), with interventions and protests due on or before December 5, 2002. The New

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[8] 16 U.S.C. § 824(e) (2000).

[9] Citing Energy East South Glens Falls, LLC, 86 FERC ¶ 61,254 at 61,915 (1999).

[10] Petition at 21.

York Mercantile Exchange (NYMEX) filed a timely motion to intervene.

47. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, NYMEX's timely and unopposed motion to intervene serves to make it a party to this proceeding.

VII. Commission's Determination

48. Pursuant to Section 201(a) of the FPA, the Commission is charged with regulating the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. Section 201(b) provides that the Commission shall have jurisdiction over facilities for wholesale sales in interstate commerce or for transmission in interstate commerce. In Section 201(e), a public utility is defined as any person who owns or operates facilities subject to the jurisdiction of the Commission. Traditionally, jurisdictional facilities have been either physical facilities such as transmission lines or "paper" facilities such as wholesale power contracts through which entities engage in wholesale power sales. However, in recent times, as competitive electric markets have begun to emerge, new market institutions and entities that do not own traditional facilities, but that can play significant roles in the trading of electric energy and the development of competitive electric markets, have also surfaced. As discussed below, the Commission has had to determine whether the activities of such institutions and entities invoke the Commission's jurisdiction. In making a determination of jurisdictional status, the Commission must necessarily analyze the facts of each case.

49. Upon review of Pacer's Petition, we find that Pacer itself will not own, operate, or control facilities used for the sale or transmission of electric energy in interstate commerce and that the characteristics of Pacer's expected operations do not trigger regulation by this Commission. The Commission understands Pacer’s trading platform operations to result in jurisdictional bilateral power contracts among its members with prices and terms that are not fixed by Pacer and that such transactions could take place “entirely without Pacer’s involvement.” *Petition at 20.* Accordingly, at this time, we find that Pacer does not exercise effective control over jurisdictional facilities or transactions and is not a public utility as defined under Section 201(e) of the FPA.

50. In Continental Power Exchange, Inc., the Commission determined that it was not within the Commission's jurisdiction to regulate the operation of a computerized brokerage service (Continental) that permitted buyers and sellers to anonymously trade

energy.[11] Similar to Pacer, Continental did not propose to control the information, such as price and quantity, that its subscribers entered into its system. Additionally,

Continental, like Pacer, did not propose to take title to any power sales that were transacted between its subscribers.[12]

51. Further, unlike the CalPX or APX, Pacer will not set energy prices, choose or match the parties to a transaction, or manage or schedule transmission service since its level of involvement is limited to the administrative operation of the environment in which its members will conduct their trades, and the supply and sale of non-power commercial services to its members.

52. Pacer's operation of an online platform that allows authorized members to trade supplemental power and obtain non-power commercial services may be expected to encourage buyers and sellers to enter into bilateral contracts. Further, by adding another market medium by which parties may buy and sell forward contracts for up to twelve months into the future, Pacer's system could promote less reliance on the more volatile spot markets.[13]

53. We accept Pacer's offer to provide the Commission, as well as Commission-recognized market monitors, with information pertaining to the transactions of its members and the operations of its system. In light of the discussion above, it is important for the Commission to have access to the type of information that Pacer has offered to provide. Thus, our order is premised upon our understanding that Pacer will provide us with information that includes the names of all parties that have applied for membership and that have been granted or denied membership, as well as a copy of the membership agreement used by Pacer and a representative copy of any other documents required to be signed by members. If not otherwise contained in the membership agreement, Pacer should explicitly state all of the eligibility conditions and rules, including Pacer’s initial credit screen requirements, to be met for an entity to become a member of the Pacer

[11] 68 FERC ¶ 61,235 (1994).

[12] However, the fact that a power broker does not take title to the power is not, in and of itself, indicative of whether that power broker is subject to the Commission's jurisdiction.

[13] However, we do not endorse one information or brokering service over another. Each market participant should evaluate its own needs and determine if a particular trading platform or brokering service satisfies those needs.

system. This type of information is important to the Commission in conducting market oversight of bulk power markets and protecting customers. In addition, we will require information, as requested from time to time by our staff, which is necessary for

the Commission to carry out its regulatory responsibilities. If desired, Pacer may seek confidential treatment of this information as provided by Section 388.112 of the Commission's regulations.[14]

54. We also caution Pacer that our determination that Pacer is not a public utility under the FPA is based on our understanding of the facts as presented in Pacer's application. Pacer asserts that it "neither fixes any price or term for power sales, or takes or manages title to power; in fact, every sale of power through Pacer's electronic bulletin board can take place entirely without Pacer's involvement." *Petition at 20*. As such, Pacer's initial or on-going credit screen, rules, standard form of agreement or any other aspect of its operation should not have the effect of directly or indirectly fixing any price or term for jurisdictional power sales.

55. Further, since the transactions resulting from Pacer's operations are bilateral jurisdictional contracts to which Pacer is not a party, no aspect of Pacer's operations shall limit the Commission's ability to address matters subject to its jurisdiction with respect to such contracts notwithstanding Pacer's rules or agreements. For example, Pacer's rules cannot preclude a contracting party from "contesting" the administration of a jurisdictional contract, if such contest can be properly be brought before this Commission. If those facts change or if Pacer operates its facilities in a manner different from its representation, we may revisit our determination. Further, if in the future, Pacer's system exerts material influence over the price, terms or conditions of, or participants in jurisdictional service, we may re-examine our jurisdictional determination.

56. While the Commission has determined that Pacer is not a public utility, we note that we do have broad authority to obtain information from non-regulated entities such as Pacer for purposes of investigations or other proceedings under the FPA (<u>see</u> Sections 307(b) and 311 of the FPA).[15] In addition, our determination in this order in no way affects whether other agencies may have jurisdiction over Pacer or its activities.

<u>The Commission orders</u>:

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[14] 18 C.F.R. § 388.112 (2003).

[15] 16 U.S.C. §§ 825f(b), 825j (2000).

(A) Pacer's petition for declaratory order is hereby granted, as discussed in the body of this order.

(B) Pacer is directed to inform the Commission of any change in the operation of its facilities or the facts represented herein.

(C) This order is premised on Pacer providing the Commission with information and documents as described herein. The Commission reserves the right to require additional information as necessary to monitor bulk power markets and protect customers.

(D) The Commission reserves the right to re-examine Pacer's jurisdictional status, as discussed in the body of this order.

By the Commission. Commissioner Massey dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacer Power LLC Docket No. EL03-23-000

(Issued July 25, 2003)

MASSEY, Commissioner, dissenting:

I disagree with this order's finding that Pacer is not a public utility. Based on the recent history of the gas and electricity markets -- with their occasional turmoil, volatility, and increased complexity -- as well as our duty to ensure that market based rates are just and reasonable and not unduly discriminatory, I believe that the time has come to assert jurisdiction over Pacer Power and all similar trading platforms.

Trading platforms have become increasingly important. As today's order points out, a significant number of electricity transactions are facilitated and confirmed through market platforms such as Pacer. The products transacted on such electronic platforms are becoming integral to energy suppliers and their customers, the prices that are charged, and the terms and conditions of such transactions. As the importance and influence of such platforms grows, so does the need for Commission oversight. We have seen what can happen when platforms are not operated in a fair way. Thus, I believe that the Commission has a significant interest in performing a reasonable degree of oversight of trading platforms to assure that the markets they operate are fair and competitive.

It is clear that asserting jurisdiction over trading platforms would amount to an evolution of the Commission's jurisdictional reach. But I firmly believe the Commission has such jurisdiction. In situations involving trading platforms such as Pacer, the key consideration is the degree to which the platform operator affects trade. Pacer is not merely a passive bulletin board provider. Pacer sets certain standards for the trades that may be transacted and regarding who may participate in its operations. Through such standards, Pacer may affect which jurisdictional transactions are made and the prices of those transactions. This significant effect on jurisdictional transactions renders Pacer's platform a jurisdictional facility.

I also believe that routine assured Commission access to trading data from platforms such as Pacer is integral to the Commission's oversight of wholesale markets. While Pacer has offered to provide some of this information to us, such access depends on the promise of a non-jurisdictional entity and thus is not assured. In addition, we have no such commitment from other market platforms similar to Pacer.

The Commission should assert its jurisdiction here. We need to assure through reasonable oversight that such platform markets are operated fairly so that prices to customers are just and reasonable. To do that, the Commission needs two things. One is an assured way for the Commission to access transaction data in a routine way. The other is to be able to review membership agreements or requirements that entities must meet to be able to trade on a platform so that the Commission can ensure that those requirements are not discriminatory. Currently there is no legally enforceable way for the Commission to access such information.

How should we exercise our jurisdiction? There is no need for intrusive regulation of fees and practices of platforms and exchanges. Instead, the Commission could craft an appropriately light-handed approach as we have with the Automated Power Exchange. At this point in the industry's evolution toward market solutions, asserting our jurisdiction over trading platforms and then judiciously exercising that jurisdiction is the prudent course. In this way, we can ensure just and reasonable prices and protect market participants from undue discrimination.

For these reasons, I dissent from today's order.

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William L. Massey
Commissioner